Michigan Law Review

Volume 24 | Issue 7

1926

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Recommended Citation

POLICE LEGISLATION UNDER FEDERAL POWERS, 24 MICH. L. REV. 701 (1926).
Available at: https://repository.law.umich.edu/mlr/vol24/iss7/6

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POLICE LEGISLATION UNDER FEDERAL POWERS.—A recent case decided by the United States Supreme Court *United States v. Daugherty* (Jan. 4, 1926) 46 Su. Ct. 156 (Adv. Opn. 303) sustained a conviction and sentence under the Harrison Anti-Narcotic Act, 38 Stat. 785, for "making unauthorized sales of cocaine to three different persons on different days." The indictment was in three counts, one covering each sale involved. The sentence imposed was, "five years on each of said three counts. * * * * Said term of imprisonment to run consecutively and not concurrently."

The comment of the court upon the constitutional point is chiefly of interest for the purpose of this note. It suggests a tendency to apply, to this class of cases, doctrine approved in the line of cases cited. That doctrine aims at a narrowing down of the broad scope given legislative power of Congress by reason of the authority reasonably to be implied as necessary to the granted powers, where the exercise of implied power led into the field of activity defined as social or police legislation and which is placed in the states by our general scheme of government. The quotation follows: "the *constitutionality* of the Anti-Narcotics Act, touching which this court so sharply

divided in *United States v. Doremus*, 249 U. S. 86, was not raised below, and has not been again considered. The doctrine approved in *Hammer v. Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20; *Hill v. Wallace*, 259 U. S. 44; and *Linder v. United States*, 268 U. S. 5; may necessitate a review of that question if hereafter properly presented."

A brief review of the cases cited by the court will serve a useful purpose in this study of the power of the federal law-making bodies to regulate police matters. The taxing power (federal) was the basis of the statute in the *Doremus* case, the *Child Labor Tax* case, the *Hill* case and in *Linder v. United States*: *United States v. Doremus* and *Linder v. United States* were criminal suits under the same statute (Harrison Anti-Narcotic Act) as that involved in the instant case. In the *Doremus* case the conviction of a physician arising out of the sale of 500-1/6 grain tablets of heroin to a drug addict was upheld. Such dealing out of the forbidden goods could not be considered by the court as coming under the exception providing that the terms of the act did not apply "to physicians dispensing and distributing drugs to patients in the course of professional practice." On the point of the power of Congress under the taxing clause (Art. 1, Sec. 8) the court said, "under such limitation (geographical uniformity) Congress may select the subject of taxation and may exercise the power conferred at its discretion. Of course, Congress may not in the exercise of federal power exert authority wholly reserved to the states. * * * * * And from an early day this court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the court to inquire into that subject. If the legislation enacted has some reasonable relation to the exercising of the taxing authority conferred by the Constitution it cannot be invalidated because of the supposed motive which induced it." The *Linder* case arose out of the conviction of a physician under Sec. 2 of the act for dispensing one tablet of morphine and three tablets of cocaine for the treatment of no disease, other than the addiction itself. The conviction was reversed on the ground that the act complained of could not be said by the court to "necessarily transcend the limits of that professional conduct with which Congress never intended to interfere." The broad doctrine in the *Doremus* case and that in *McCrary v. United States*, 195 U. S. 27; is departed from to some extent in the interpretation of the statute given in this case. Here the Congressional motives are looked to and the language of the opinion indicates a tendency to sustain those cases where the provision "impelled" by the taxing motives or necessary to the exercise thereof is concerned and to distinguish the cases where the "control of medical practice in the states" is sought, this being "beyond the power of the federal government." In the present case the question of constitutionality is not brought up for review but the court suggests that its holdings in the cases listed might make a review of that point necessary if properly brought before them. In the *Child Labor Tax* case (*Bailey v. Drexel Furniture Co.*) the court declared the Child Labor Tax law, 40 stat. 1057, 1138, which placed a tax upon the income of every person, with certain specified exceptions, employing children under conditions violating this law, to be unconstitutional. The law was found bad as an act of Congress under the taxing power by reason of the fact that it did more than levy a tax and by its own terms it attempted to regulate employment of children, which is within the state police power, by

the imposition of penalties. The court distinguished this case from *United States v. Doremus* upon the point that the legislative motive appeared upon the face of the statute. *Hill v. Wallace* declared invalid an act of Congress attempted under the federal taxing power, the Future Trading Act 42. stat. 187, which in its purpose and on its face was a regulation of such transactions by Boards of Trade,—another situation where the statute, as framed, allowed the legislative motive to be too clearly shown. Or perhaps better expressed, it was a case where Congress undertook a program (prescribing a course of business) the true nature of which could not be hidden under the taxing clause. Mr. Chief Justice Taft in the *Child Labor Tax* case opinion lays down the proposition that, "They (Acts of Congress) do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of penalizing features of the so-called tax when it loses its character as such". It is submitted that the legislative motive (revenue or regulation for public good) becomes important under this test.

The remaining case, *Hammer v. Dagenhart,* brings before us the congressional statute aimed to remedy the child labor situation in the country as a whole and enacted under the commerce clause. The court denied its authority or disposition to inquire into the legislative motive. In view of the fact that the law was held unconstitutional as an attempt to control a course of business in producing goods for inter-state shipment rather than regulation of the means or channels of commerce, we cannot interpret motive as referring to the end sought by the legislators. It is evident that the court was of the conviction that the legislative power of Congress under the commerce power had been stretched to the limit. The distinction employed to set this case apart from many other cases involving activities held subject to regulation under the commerce clause is not too convincing. That the injury arising out of child labor would be complete before the prohibition upon interstate shipment would have any force does not clearly distinguish this situation from the activities sought to be controlled under that group of statutes, under the commerce clause, beginning with and following in the trail of the Sherman act, which make contractual and other acts, transpiring in the course of a business long before any actual commerce takes place, unlawful.

Under later cases, *Dayton-Goose Creek Ry. Co. v. Interstate Commerce Commission,* 263 U. S. 456; and *Wilson v. New,* 243 U. S. 332, the commerce power has been held to extend to the securing of the social interest in a sound, efficient, national transportation system and to the same interest in the continuity of operation in order to prevent suffering and disease as a result of cutting off supply of necessities of life. Here surely is a phase of national police power. We are mindful that Congress has no general national police power, and that the courts are justified in attempting to hold closely to the delegated powers of the federal government and the narrower incidental power flowing from these. If the American people are coming into a keener national consciousness and if the agencies of commerce and business have become so extensive as to work harm to the national welfare which the states can not cope with, and which is not within the more limited scope the federal delegated powers, the people of the nation have in their power to delegate to their federal government power for regulating these menacing factors in national life by amending the federal constitution. This would be a test of our supposed increasing

national solidarity which, it is argued, demands a further centralization of power in the national government.

As the law of the federal constitution now stands it is clear that the demands of national welfare which would be expressed in law setting up a higher standard than exists in certain of the states does not transfer power to the national Congress to pass laws providing a uniform standard as high as that of the majority of states. At the time of their early decisions the court could not see the extent to which the legislative and executive departments were going to carry the incidental police power which goes with the delegated authority and quite naturally they followed hesitating to call a halt. It is small wonder then that they are seeking a clearer delimitation upon these federal powers at this time when experience in their application to the administration of justice has developed the materials for such desirable process. R. F. C.